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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

DANIEL J. CHRISTENSEN, Plaintiff and Appellant, v. ALLSTATE INSURANCE COMPANY, Defendant and Respondent.	A100762 (Sonoma County Super. Ct. No. 228900)

I.

INTRODUCTION

Plaintiff Daniel J. Christensen (Christensen) appeals after the trial court entered an order granting summary adjudication in favor of defendant Allstate Insurance Company (Allstate) on Christensen's lawsuit alleging Allstate acted in bad faith in failing to defend and indemnify him in a third-party lawsuit. The trial court concluded Allstate had no duty to defend Christensen, its insured, in the third-party action, characterized by the trial court as "a palimony suit that arose from a long-term romantic relationship." Christensen contends the trial court's ruling improperly focused on the allegations of economic injury asserted against him, and ignored a cognizable claim for bodily injury that was potentially within the coverage provided under Allstate's insurance policy. We disagree and affirm.

II.

FACTS AND PROCEDURAL HISTORY

A. *The Underlying Lawsuit*

On January 31, 2001, Elvie Nelson, Christensen's former live-in girlfriend, sued him in a case entitled *Elvie Nelson v. Daniel Christensen et al.* in Sonoma County Superior Court Case No. 226107 (the Nelson action). The complaint alleged Christensen induced Nelson to leave her native Philippines to reside with him in Sonoma County. Following Nelson's arrival in the United States, she allegedly devoted herself to Christensen's businesses and household. Christensen, who served as Nelson's sole means of financial support, allegedly limited Nelson's social interactions and restricted her educational opportunities. It was further alleged that Christensen "repeatedly" told Nelson "that it was his intention to marry her" and that he promised to "provide for her financial security for the rest of her life." Christensen allegedly breached their alleged agreement on or about October 2000 by "ceasing to provide financial support" to Nelson and "by essentially throwing [Nelson] out of the only home that she had known since living in the United States." The Nelson action alleged, among other things, breach of an oral and implied contract, claims for quantum meruit and promissory estoppel, unlawful business practices, and fraud.

The crux of Nelson's complaint was Christensen's alleged breach of his promise to marry her and to provide for her financial security for the rest of her life. However, Nelson's seventh cause of action, styled "Intentional Infliction of Emotional Distress," averred that Christensen "forcibly ejected" Nelson from their shared residence. The complaint further alleged that "[a]s a direct, proximate result of the afore-mentioned acts, [Nelson] has suffered humiliation, mental anguish, and emotional and physical distress and has been injured in mind and body . . . ."

Christensen tendered the defense of the Nelson action to Allstate, from whom he had purchased a "Deluxe Plus Homeowners Policy" and a "Comprehensive Personal

Liability [CPL] Policy."[1] Allstate informed him by letter dated April 18, 2001, that it would not provide a defense because the Nelson action fell outside the insuring agreements of these policies.

On March 4, 2002, almost one year after Allstate denied coverage, Nelson filed an amended complaint in the underlying action. The amended complaint was substantially the same as the original complaint, but included a cause of action for "Negligent Infliction of Emotional Distress and Bodily Injury." Specifically, the amended complaint alleged that defendant Christensen "negligently conducted himself so as to inflict emotional distress and bodily injury upon [Nelson]." The amended complaint included no new or additional facts, however. Shortly after the amended complaint was filed, Christensen settled the Nelson action by making an $85,000 payment to her.

B. *The Instant Action*

Nelson sued Allstate, as well as several other defendants, asserting that Allstate had breached its contractual duty to defend and indemnify him in connection with the Nelson action and acted in bad faith in refusing to do so. Christensen and Allstate eventually brought cross-motions for summary adjudication. The trial court granted Allstate's motion for summary adjudication, finding there was no potential liability for covered damages because "[n]either the pleadings nor the submitted extrinsic evidence in the Nelson action allege facts that could possibly support a cognizable claim for bodily injury or tangible property damage covered under the CPL or the Homeowners Policy." This appeal followed.[2]

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[1] Christensen's position, for the purposes of this appeal, is that only the homeowners policy and the CPL policy obligated Allstate to defend him against the Nelson action, although he was the named insured on several other Allstate policies.

[2] Allstate claims this appeal was filed from a nonappealable order and should be dismissed. On November 12, 2002, Christensen filed a notice of appeal purporting to appeal from "the Order granting defendant ALLSTATE INSURANCE COMPANY'S Motion for Summary Adjudication, filed on September 17, 2002 . . . ." The order Christensen purports to appeal from, an order granting a motion for summary adjudication, is not appealable because it is an interim order. Appeal lies from the

III. DISCUSSION

A. Standard of Review

Summary judgment is proper where "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843-857.) We review a summary judgment de novo. (*Merrill v. Navegar, Inc*. (2001) 26 Cal.4th 465, 476-477.) The interpretation of an insurance policy, like other contracts, is a legal question to which the court applies its own independent judgment. (*Western Mutual Ins. Co. v. Yamamoto* (1994) 29 Cal.App.4th 1474, 1481; *State Farm Fire & Casualty Co. v. Eddy* (1990) 218 Cal.App.3d 958, 964-965.)

B. Principles Concerning the Duty to Defend

The principles governing an insurer's duty to defend are well settled. In *Waller v. Truck Ins. Exchange, Inc*. (1995) 11 Cal.4th 1 (*Waller*), our Supreme Court said: "It has long been a fundamental rule of law that an insurer has a duty to defend an insured if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement. [Citations.] This duty, which applies even to claims that are 'groundless, false, or fraudulent,' is separate from and broader than the insurer's duty to indemnify. [Citation.] However, ' "where there is no possibility of coverage, there is no duty to defend . . . ." ' [Citation.] . . . [T]he determination whether the insurer owes a duty to defend usually is made in the first instance by comparing the

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ensuing judgment of dismissal, which was entered on December 3, 2002. (E.g., *Garcia v. Hejmadi* (1997) 58 Cal.App.4th 674, 680; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 119, p. 183.) Nevertheless, under such circumstances, we are reluctant to employ such a drastic measure as dismissal. Instead, in accordance with the rule requiring that a notice of appeal be liberally construed in favor of its sufficiency, we shall treat Nelson's notice of appeal as perfecting a valid, premature appeal from the judgment filed shortly after the order. (Cal. Rules of Court, rules 1(a); 2(c); see Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs 1 (The Rutter Group 2002) ¶ 2:67, pp. 2-36.4 to 2-36.5 (rev. #1, 2002).)

allegations of the complaint with the terms of the policy. Facts extrinsic to the complaint give rise to a duty to defend when they reveal a possibility that the claim may be covered by the policy. [Citations.]" (*Id*. at p. 19; see also *Atlantic Mutual Ins. Co. v. J. Lamb, Inc*. (2002) 100 Cal.App.4th 1017, 1033-1034; *Michaelian v. State Comp. Ins. Fund* (1996) 50 Cal.App.4th 1093, 1106.)

Moreover, the form of the legal theory asserted by the third-party claimant is immaterial. (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 841; *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 824-825.) If the facts alleged in the underlying complaint give rise to a potentially covered claim under any conceivable theory, a duty to defend exists irrespective of the technical legal cause of action pleaded by the third party. (*Vandenberg v. Superior Court*, *supra*, at p. 841; *Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 300.) "Whether there is such a 'conceivable theory' [giving rise to a potential for covered damages] is a question of law. [Citation.]" (*Belmonte v. Employers Ins. Co*. (2000) 83 Cal.App.4th 430, 433; *Aetna Casualty & Surety Co. v. Superior Court* (1993) 19 Cal.App.4th 320, 327 [duty to defend, while broader than the duty to indemnify, is not unlimited; if complaint shows "no potential liability for covered damages as a matter of law, there cannot be the potential for indemnification, nor can there be a duty to defend."].)

C. Summary Adjudication Was Properly Granted Because the Complaint Revealed No Potential for Liability for Covered Damages as a Matter of Law

The homeowners policy at issue contains language that provides coverage for "damages which an insured person becomes legally obligated to pay because of bodily injury or property damage arising from an occurrence to which this policy applies . . . ." The homeowners policy defines an "occurrence" as "an accident . . . resulting in bodily injury or property damage." The CPL contains similar coverage language. Both policies explicitly exclude coverage for bodily injury intended by, or which may reasonably be expected to result from, the intentional or criminal acts of the insured.

The policies' limitation of coverage to acts not intended or expected by the insured, or accidents, is consistent with the definition of an insurance contract under

California law, which recognizes fortuity as an essential element of coverage. (See Ins. Code, §§ 22; 250; 533.) "Accident" has been given a commonsense interpretation: an "unintentional, unexpected, chance occurrence." (*Modern Development Co. v. Navigators Insurance Co.* (2003) 111 Cal.App.4th 932, 940, fn. 4 (*Modern Development Co.*).) "In its plain and ordinary sense, 'accidental' means 'arising from extrinsic causes[;] occurring unexpectedly or by chance[; or] happening without intent or through carelessness.' [Citation.] [Citation.]" (*Northland Ins. Co. v. Briones* (2000) 81 Cal.App.4th 796, 810; see also Croskey & Kaufman, Cal. Practice Guide: Insurance Litigation (The Rutter Group 2003) ¶ 7:44, pp. 7A-15 to 7A-16 (Croskey.)

The flip side of this concept is that injuries produced by acts which are intentionally and purposefully performed are not the result of an "accident," regardless of whether the actor intends to cause injury. In other words, "[t]here is no accident when the insured deliberately performs all of the acts that resulted in the victim's injury, even though the insured did not intend to cause that injury. [Citations.]" (Croskey, *supra*, ¶ 7:46, p. 7A-16; *Collin v. American Empire Ins. Co.* (1994) 21 Cal.App.4th 787, 804; *Uhrich v. State Farm Fire & Casualty Co*. (2003) 109 Cal.App.4th 598, 610.) This is not to say that an accident can never result from an intentional act. However, in order for an accident to occur as the result of an intentional act, there must be " 'some additional, unexpected, independent, and unforeseen happening . . . that produces the damage.' [Citation.]" (*Quan v. Truck Ins. Exchange* (1998) 67 Cal.App.4th 583, 600, fn. & italics omitted (*Quan*).)

Allstate argues that the factual allegations made in Nelson's complaint do not describe an event that would constitute "an accident . . . resulting in bodily injury or property damage" under the insurance policies. Allstate points out that the gravamen of the Nelson action lies in her claim for just compensation for monies owed in return for her contribution to Christensen's businesses and household. As one court has held, "strictly economic losses like lost profits, loss of goodwill, loss of the anticipated benefit of a bargain, and loss of an investment, do not constitute damage or injury to tangible property covered by a comprehensive general liability policy. [Citations.]" (*Giddings v.*

Industrial Indemnity Co. (1980) 112 Cal.App.3d 213, 219; see also *Chatton v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 846, 857-858; *Devin v. United Services Auto. Assn*. (1992) 6 Cal.App.4th 1149, 1158.) Moreover, Allstate stresses that our Supreme Court has held that emotional and physical distress flowing from economic losses are not within the scope of liability insurance for "bodily injury." (*Waller*, *supra*, 11 Cal.4th at pp. 26-27.) The *Waller* court reasoned that, since economic losses are not covered by a comprehensive liability policy, bodily injury that is a byproduct of such an economic loss should not be covered either. (*Ibid*.; see also *American Internat. Bank v. Fidelity & Deposit Co.* (1996) 49 Cal.App.4th 1558, 1570.) Allstate claims the trial court properly granted it summary adjudication because it had no duty to defend Nelson's claims of emotional and physical distress flowing from economic losses suffered as a result of her failed business and personal relationship with Christensen.

For the most part, Christensen does not disagree with these arguments. However, he attempts to blunt the impact of the Supreme Court's holding in *Waller* by pointing out that Nelson's alleged physical distress did not derive *solely* from uncovered economic losses. Christensen claims there is a potential for coverage under the Allstate policies and, thus, a duty to defend the entire action because of a single allegation in the underlying Nelson action. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 48 [in a " 'mixed' action in which some of the claims are at least potentially covered and others are not, the insurer . . . has a duty to defend the action in its entirety"].)

Specifically, Christensen focuses on a single allegation made in the original complaint in the Nelson action tendered to Allstate, which states that Christensen "forcibly ejected [Nelson] from the parties' residence" and that "[a]s a direct and proximate result of the afore-mentioned acts, [Nelson] has suffered humiliation, mental anguish, and emotional and physical distress and *has been injured in the mind and body* . . . ." (Italics added.) Christensen also emphasizes that the complaint, as last

amended, alleged that "[Christensen] *negligently* conducted himself [so] as to inflict . . . bodily injury upon [Nelson]." (Italics added.)[3]

Christensen acknowledges that the allegations of the original and the amended complaint fail to state the manner in which Nelson suffered bodily injury or the nature of her alleged injuries. Furthermore, even after conducting extensive discovery in the Nelson action, Christensen produced no deposition testimony, answers to interrogatories, or declarations that provide Allstate with information suggesting Nelson suffered bodily injury within the coverage provided by the insurance policies.[4]

In short, we can find nothing in the factual allegations of the complaint or amended complaint suggesting that an accident occurred at Nelson's residence which caused Nelson bodily injury. Essentially, Nelson is seeking coverage for allegedly injuring Nelson when he "forcibly ejected" her from their shared residence. But regardless of whether Christensen intended the alleged harm that resulted from forcibly ejecting Nelson, any harm caused was a direct result of Christensen's *intentional* conduct in forcibly ejecting Nelson and may not be considered an accident. "[I]n this case, the insured's conduct alleged to have given rise to claimant's injuries is necessarily non-accidental . . . simply because the conduct could not be engaged in by 'accident.' " (*Quan*, *supra*, 67 Cal.App.4th at p. 596.) The "injurious physical contact" which occurred "may have been a 'mistake,' but it was no accident." (*Id.* at p. 599; see also *Northland Ins. Co. v. Briones* (2000) 81 Cal.App.4th 796, 810-811.)

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[3] While the insurer has no continuing duty after the original refusal to defend to investigate or monitor the lawsuit to see if the third party makes a new claim not found in the original lawsuit, it appears that Christensen submitted a copy of the amended complaint to Allstate, his insurer, shortly after his settlement with Nelson. (*Gunderson v. Fire Ins. Exchange* (1995) 37 Cal.App.4th 1106, 1117.)

[4] In fact, in Nelson's deposition testimony, which is included as part of the record on appeal, she testified that it was her decision to leave the Christensen residence. Also, when asked by interrogatory to identify her bodily injuries, Nelson replied: "Physical exhaustion and inability to bear children. Extreme mental and emotional distress."

Christensen argues that Allstate should have defended him in any event because Nelson's complaint was amended to specifically include a negligence claim, and "[n]egligent infliction of physical injury is clearly a covered claim . . . ." However, "[c]laims do not exist in the ether, they consist of pleaded allegations coupled with extrinsic facts. That is what defines the insurer's coverage duties, not the label chosen by the pleader. [Citation.]" (*Uhrich v. State Farm Fire & Casualty Co*., *supra*, 109 Cal.App.4th at pp. 610-611.) Accordingly, courts have repeatedly rejected the argument that there is a duty to defend nonaccidental conduct just because it is couched in terms of "negligence." (*Ibid*.; see also *Swain v. California Casualty Ins. Co*. (2002) 99 Cal.App.4th 1, 10; *Quan*, *supra*, 67 Cal.App.4th at pp. 595-596; *American Internat. Bank v. Fidelity & Deposit Co.*, *supra*, 49 Cal.App.4th at pp. 1572-1573.)

Furthermore, Christensen claims that because the facts underlying the negligence claim in Nelson's amended complaint "could be crafted to state other claims for bodily injury or property damage," Allstate was required to provide a defense. However, "[a]n insured may not trigger the duty to defend by speculating about extraneous facts regarding potential liability or ways in which the third party claimant might amend its complaint at some future date." (*Gunderson v. Fire Ins. Exchange*, *supra*, 37 Cal.App.4th at p. 1114; *Hurley Construction Co. v. State Farm Fire & Casualty Co*. (1992) 10 Cal.App.4th 533, 538.)

Because the factual allegations of the complaints filed in the Nelson action did not describe an event that was potentially covered under the policies, and Christensen has failed to provide Allstate with any additional information that would have suggested Nelson suffered bodily injury as the result of an accident on the premises, there was no duty to defend or indemnify Christensen in the underlying action. Accordingly, the trial court correctly granted summary adjudication in favor of Allstate. (See *Modern Development Co*., *supra*, 111 Cal.App.4th at p. 943.)

IV.

DISPOSITION

The judgment is affirmed.

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Ruvolo, J.

We concur:

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Kline, P.J.

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Haerle, J.